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IN THE

Supreme Court of the United States

October Term, 1982

BENJAMIN SIEGEL,

Petitioner,

v.

THE STATE OF NEW YORK and EDWARD J. KURIANSKY, Deputy Attorney General for Medicaid Fraud,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR CERTIORARI

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Questions Presented for Review

1. Whether under *Santobello* v. *New York*, 404 U.S. 257 (1971) and *Blackledge* v. *Allison*, 431 U.S. 63 (1977), federal due process requires enforcement of a plea bargain established as entered into but which is not explicitly set forth on the allocution record.

2. Whether federal due process as defined by *Boykin* v. *Alabama*, 395 U.S. 257 (1977), prohibits a state from shifting the burden of establishing the voluntariness of a guilty plea to a defendant and his counsel where the sentencing judge has failed to make an on-the-record inquiry whether any promise induced the plea.

3. Whether the Second Circuit's holding that a state may apply a "statute of frauds" rule that a judicially established plea bargain which has not been placed on the sentencing record by a defendant is unenforceable violates due process and represents a significant conflict with the other Circuit Courts of Appeal.

4. Whether, under *Sumner* v. *Mata*, 449 U.S. 539 (1981), the Second Circuit erroneously reversed without explanation the findings of the District Court Judge who complied with 28 U.S.C. §2254(d) by accepting the fact findings of the state courts.

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Citations to Opinions

The October 22, 1982 decision and judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed reversing the District Court and dismissing the petition/complaint is not yet officially reported and is reproduced in Appendix A.

The June 15, 1982 decision and order herein of the United States District Court for the Southern District of

New York granting petitioner a preliminary injunction is not yet officially reported and is reproduced in Appendix B.

The opinion and order of New York State Supreme Court Justice Balbach finding and enforcing the plea bargain herein and modifying respondent's grand jury subpoena is unreported and is reproduced in Appendix C.

The opinion of the Appellate Division of the New York State Supreme Court unanimously affirming Justice Balbach is reported at 83 A.D. 2d 630, 441 N.Y.S. 2d 698 (2nd Dept. 1981) and is reproduced in Appendix D.

The opinion and order of the New York Court of Appeals reversing the Appellate Division is reported at 55 N.Y. 2d 116, 447 N.Y.S. 2d 905, 432 N.E.2d 777 (1982) and is reproduced in Appendix E.

The certification of the New York Court of Appeals that it passed upon petitioner's due process claim that his "federal constitutional rights are violated by the requirement that, once a record is made of the terms of a plea bargaining agreement, all promises made to the pleading defendant must be made a part of that record before they will be enforced" is reported at 56 N.Y. 2d 570, 450 N.Y.S. 2d 186, 435 N.E.2d 403 (1982) and is reproduced in Appendix F.

The March 5, 1981 decision and order of the New York State Supreme Court, New York County, denying petitioner's motion to withdraw his plea is unreported and is reproduced in Appendix G.

Jurisdictional Grounds for Review

The judgment of the Second Circuit Court of Appeals was entered on October 22, 1982. Appendix A.

A timely petition for rehearing and suggestion for reconsideration in banc was denied on December 3, 1982.

On November 15, 1982, the Second Circuit stayed its mandate pursuant to App. Rule 41(b) pending application to this Court for a writ of certiorari.

The jurisdiction of this Court is conferred by 28 U.S.C. §1254(1).

Constitutional Provisions and Statutes Involved

This case involves Section 1 of the Fourteenth Amendmen to the United States Constitution, 28 U.S.C. §2254(d), 42 U.S.C. §1983, N.Y. Constitution, Article VI, §3(a), N.Y. Criminal Procedure Law §§ 440.10(1)(h) and 440.20(1), and N.Y. CPLR 5501(b), (c).

These provisions are set out verbatim in Appendix H.

Statement of the Case*

In January 1979, petitioner, a wholesale meat salesman, pleaded guilty in the New York State Supreme Court, New

* The facts here stated are as found by the decisions of the courts which made fact findings in the litigations between the parties—see Appendices B, C, and D—and in petitioner's unrebutted petition/complaint and moving affidavits in the District Court. Respondent has not filed an answer or affidavits to contravene these statements. On the present record, the constitutional and other issues raised are therefore unclouded by factual questions.

York County, to one count of a multi-count perjury indictment which alleged that, in testifying before a New York County grand jury, petitioner had falsely denied knowledge of or involvement in improper payments to the health care industry.

The plea resulted from discussions suggested by the state trial judge who, in denying petitioner's motion to dismiss for defects in the indictment and in the interest of justice, said that the case was in "a gray area" and "appriate for disposition" (Appendix D, at 50a).

From the outset of these discussions, petitioner's counsel informed the court and respondent special prosecutor that petitioner would not consider a plea unless he would not be sentenced to jail and, to allow him to continue to earn his livelihood in his industry, unless he not be required again to talk or be questioned about the subjects of his grand jury testimony; and the prosecutor assented. The court accordingly stated that it would accept the plea. See p. 18, *infra*, and Appendices C and D.

On the record of the allocution, the court, noting petitioner's prior "exemplary" record and the problems faced by one in petitioner's employment, sentenced him to five years probation, which he is now serving, and a $2,500 fine.

Although the prosecutor referred to off-the-record discussions "at the Bench" (Appendix C, at 42a), the court made no formal inquiry whether any promises had induced the plea.* However, the court did not require petitioner to

* The state Appellate Division emphasized as "conspicuously absent" the "oft-posed question" whether promises were made to induce the plea (Appendix D, at 57a)—a constitutionally critical fact *not* noted by the Second Circuit Panel below in its otherwise accurate statement of the facts.

re-appear before the grand jury or to talk to the special prosecutor as a condition of receiving the sentence. And although the prosecutor had earlier represented to the court that petitioner had information important to the government, he made no effort to re-call petitioner before the grand jury or to question him again.

Six months later, another assistant in the Queens County office of the same special prosecutor, who did not know of the plea bargain, subpoenaed petitioner to appear before the Queens County grand jury.

Petitioner moved to quash the subpoena. The Queens County branch of the New York Supreme Court held a two-day evidentiary hearing at which petitioner's counsel and the assistant prosecutor who had negotiated the plea testified. That court found that the prosecutor had knowingly induced petitioner's guilty plea on the understanding, of which the sentencing court was aware, that petitioner would not again be questioned about the subjects of the grand jury testimony that led to his indictment. Invoking *Santobello*, it accordingly modified the new subpoena to limit inquiry to matters not covered by petitioner's New York County testimony. Appendix C.

These findings were expanded and the result unanimously affirmed by the Appellate Division in the exercise of its statutory power to make its own factual findings. Appendix D. N.Y. CPLR 5501(c). Appendix H, at 76a.

New York State's Constitution and statutes deny to its Court of Appeals jurisdiction to review or modify fact findings made by an Appellate Division in affirming a trial

court. N.Y. Constitution, Art. XI, §3(a); N.Y. CPLR 5501(b). Appendix H, at 75a.

Without disturbing the fact findings of the state Supreme Court in Queens or of the Appellate Division, the New York Court of Appeals nonetheless reversed on the ground that the hearing should not have been held (as "unnecessary") because petitioner's counsel had not placed the promise on the record when the plea was entered. Appendix E.

The state Court of Appeals acknowledged that this was the first time that it applied such a rule where the plea bargain was uncontradicted by the record and where the sentencing judge and the prosecutor complied with the bargain.* That Court also held it to be a "mere fact" that the sentencing court, which was aware of and honored the bargain, had not asked whether any promise induced the plea, stating that even though in "every case" the judge should ask that question, the defendant had the "burden"

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* In two earlier decisions, the New York Court of Appeals ruled that such a promise could not be asserted to contradict a thorough *Boykin* record which repudiated the existence of a claimed promise (*People* v. *Selikoff*, 35 N.Y.2d 227, 242-43, 360 N.Y.S.2d 623, 318 N.E.2d 784 (1974), *cert. den.* 419 U.S. 1122 (1974) and *People* v. *Frederick*, 45 N.Y.2d 520, 526-27, 410 N.Y.S.2d 555, 382 N.E.2d 1332 (1978)). However, it later enforced off-the-record promises which were not so contradicted (*Chaipis* v. *State Liquor Authority*, 44 N.Y.2d 57, 404 N.Y.S.2d 76, 375 N.E.2d 32 (1978)) and upheld the right to a hearing to establish off-the-record promises (see *People* v. *DeForna*, 53 N.Y.2d 1006, 442 N.Y.S.2d 476, 425 N.E.2d 864 (1981); *People* v. *McConnell*, 49 N.Y.2d 340, 425 N.Y.S.2d 794, 402 N.E.2d 133 (1980); and *People* v. *Wheaton*, 45 N.Y.2d 769, 408 N.Y.S.2d 498, 380 N.E.2d 324 (1978)). In this case, the record neither refutes the plea bargain nor did defendant disclaim one.

of placing the promise on the record, if the court fails to inquire, at the risk of losing its benefit. Appendix E, at 67a-68a.

Petitioner thereupon moved in the New York County Supreme Court, where he had been prosecuted, to withdraw his plea in view of the unenforceability of the agreement by which it had been induced. That motion was denied as barred by the ruling of the Court of Appeals, and leave to appeal was denied. Appendix G.

Having exhausted his state remedies, petitioner brought this federal habeas corpus proceeding/Civil Rights Act (42 U.S.C. §1983) suit in the United States District Court for the Southern District of New York and moved for a preliminary injunction against enforcement of the Queens subpoena.* As noted (fn., p. 3, *supra*), respondent did not file an answer or opposing affidavits.

The District Court (Sweet, J.) granted the injunction after its own review of the testimony and also because it found a sufficient basis for the findings of fact of the only jurisdictionally competent state courts that the claimed promise had in fact been made and violated. Appendix B. See 28 U.S.C. §2254(d). Appendix H, at 73a-74a.

A Second Circuit Panel (Judge Pratt, dissenting) reversed the injunction and dismissed the petition/complaint on the ground that previous decisions of the state Court of Appeals had signalled the state's intention to adopt a "stat-

* The District Court's jurisdiction was conferred by 28 U.S.C. §§2254 and 1343.

ute of frauds'' rule* for plea bargains and that such a state rule does not violate federal due process. Appendix A.

The Second Circuit did not address the District Court's ruling that, under 28 U.S.C. §2254(d), there was a presumption of correctness for the Queens County and Appellate Division findings, after a full adversarial hearing, that the proven plea bargain in this case is entitled to specific performance. The Panel's dismissal further precluded a hearing on petitioner's alternate claim to withdraw his plea in view of its manifest involuntariness if the bargain is not honored.

Reasons for Granting the Writ

1. The Second Circuit's decision is inconsistent with the controlling decisions of this Court in *Santobello, Boykin, Blackledge,* and their progeny, that federal due process requires that a defendant receive his reasonable expectations in a plea bargain; indeed, under the Second Circuit's ruling below, *Santobello* could not have been decided as it was;

2. The decision below conflicts with the prior holdings of this Court that it is the non-delegable duty of the court to

* The Second Circuit's majority opinion introduces this phrase into the decisional literature of plea bargains. The rule was not so characterized by the New York State Court of Appeals nor, so far as our research shows, in any decided case since *Santobello.* At most, furthermore, *Selikoff* and *Frederick, supra,* state no more than a "parol evidence"-type rule, not a per se "statute of frauds" rule, that a defendant may not offer evidence to contradict the terms of a clear record which disproves a plea bargain. Other authorities reject such a commercial law analogy in the due process area of plea bargaining. *Cooper* v. *United States,* 594 F.2d 12, at 16-17 (4th Cir. 1979). See generally, Westen and Westin, *A Constitutional Law of Remedies for Broken Plea Bargains,* 66 Cal.L.Rev. 471 (1976).

make a full record to establish the voluntariness of a plea and that its failure to meet its *Boykin* responsibility leaves it open to a defendant to show that his plea was not voluntary; and

3. The Second Circuit Panel's decision below creates a novel, impractical, and unconstitutional per se "statute of frauds" rule which conflicts with the decisions of this Court and of the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits and clouds the law of plea bargains in derogation of the due process concerns which justify the plea bargain process in the administration of criminal justice.

POINT I

The Decision Below Is a Clear Break With This Court's Holdings in *Santobello, Blackledge,* and Their Progeny, That a Defendant Is Entitled to His Reasonable Expectations Created by a Plea Bargain.

The present record establishes that the prosecutor made but later violated the plea bargain that petitioner would not again be required to talk or to give any information about the subjects of his grand jury testimony that led to his prosecution. Correspondingly, in addition to the state findings, the record below includes petitioner's unrebutted affidavit that he would *not* have pleaded guilty if he had not relied on the prosecutor's promise.

This case is indistinguishable from *Santobello.* Here, as in *Santobello,* petitioner was represented by counsel. Here, as in *Santobello* (404 U.S. at 259), the "second prosecutor, apparently ignorant of his colleague's commitment,

argued that there was nothing in the record to support petitioner's claim of a promise. . . ." (In this case, unlike *Santobello,* the prosecutor, at the sentencing proceedings, specifically referred to an off-the-record "conference at the Bench".) And on the unrebutted record, as in *Santobello* (404 U.S. at 262-63), the "plea rests [to a] significant degree on a promise or agreement of a prosecutor, so that it can be said to be part of the inducement. . . ."

The Second Circuit holding invites a prosecutor to induce a plea then to violate his commitment because a defendant has not volunteered an answer to a question the judge did not ask because the judge knew and approved of the answer without asking. However, *Santobello* requires only that "the essence of the promise must *in some way* be made known" (404 U.S. at 261; emph. added); it does not hold that the defendant is required to put the promise on the record when the court and prosecutor know of and comply with it.

In *Blackledge* this Court rejected the very rule the Second Circuit has now endorsed for New York. Said Justice Stewart, ". . . the federal courts cannot fairly adopt a per se rule excluding all possibility" that what a defendant later says concerning the circumstances of the plea must be disregarded. 431 U.S. at 75, citing (431 U.S. at 73-74) *Fontaine* v. *United States,* 411 U.S. 213 (1973).

Contrary to *Santobello* and *Blackledge,* the court below has endorsed a "statute of frauds" rule which, it says (Appendix A, at 11a-12a),

> "furthers the integrity of the process by requiring that the *entire* agreement be placed on the record and by treating off-the-record promises as void"

• • •

> "In view of the salutary policies fostered by the New York rule [the statute of frauds applied to plea bargains] we cannot conclude that it offends the constitutional concept of due process."*

This holding, however, does nothing to effectuate the policies it states:

The failure to fulfill the bargain obviously does nothing to enhance the likelihood of petitioner's guilt. To the contrary, its effect is to brand one in petitioner's circumstances a felon without the benefit of the bargain on the basis of a plea to an indictment of questionable validity where it was the judge who initiated the plea discussions because, in his words, the case was in a "gray area". Nor does the majority decision of the Panel encourage more openness than there was in the negotiations in this case, of which the sentencing court was fully aware. And finality was achieved but for the chance intrusion six months later of another assistant who was a stranger to the promise.

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* As Judge Pratt succinctly said (Appendix A, at 16a): "Desirable as it may be from the point of view of administering cases in the state courts, I do not believe the 'statute of frauds' rule adopted by the New York Court of Appeals and approved by the majority is permissible under *Santobello* v. *New York* [citation], and *Blackledge* v. *Allison* [citation]."

POINT II

The "Statute of Frauds" Rule Applied in This Case Violates *Boykin* by Impermissibly Shifting the Duty of Making a Record Which Establishes the Voluntariness of a Guilty Plea from the Court, Where This Court Has Placed It, to the Defendant.

The New York Court of Appeals decision, approved here by the Second Circuit, held:

> "The court should, in every case, ascertain on the record that no other promises have been made on which the defendant might be relying. If the court fails to make this determination, however, it is nevertheless the defendant's burden, on pain of losing the claimed promise, to inform the judge accepting the plea of all promises that were made to induce his plea that are not otherwise revealed." (Appendix E, at 67a-68a)*

This ruling, as now approved by the Second Circuit, violates a long line of cases in this Court which emphasize that due process requires that a sentencing court take pains to assure that a waiver of the basic constitutional rights effected by a plea of guilty is knowingly and understandingly made. E.g., *Henderson* v. *Morgan*, 426 U.S. 637, 645 n. 13 (1976); *Smith* v. *O'Grady*, 312 U.S. 329 (1941); *McCarthy* v. *United States*, 394 U.S. 459 (1969).

This Court in *Boykin* made it the constitutional responsibility of the judge, not of a defendant or his counsel, to make a complete record to do this. The objectives of assur-

* A supposed exception for the "rare case" (see Appendix A, at 9a and 12a, and Appendix E, at 67a) is meaningless since the fact of the bargain, established after a full hearing actually held, makes this a "rare case." Nor is this a post-*Blackledge* situation where a defendant has disavowed the existence of a promise.

ing guilt, avoiding secretiveness, and achieving finality are hindered, not furthered, if the penalty for the judge's failure to perform his *Boykin* duty is shifted to the defendant, who is least able and has least reason to correct the judge's default. (Even if it were in a defendant's interest to put the promise on the record, it might not be of equal advantage to either the prosecutor or the court, for example, in a case of a negotiated light sentence to a particularly violent or serious crime.)

The *Boykin* responsibility must therefore necessarily rest upon, and only upon, the trial judge because a guilty plea induced by an unfilled promise is not voluntary. *Brady* v. *United States*, 397 U.S. 742 (1970); *Santobello, supra*, at 262-263, 266. Therefore such a plea may not be accepted without the constitutionally required determination by the court "that a defendant's guilty plea is truly voluntary." *McCarthy* v. *United States, supra*, at 465-66.

This determination must be made by the court because

> "by personally interrogating the defendant, not only will a judge be better able to ascertain a plea's voluntariness, but he will develop a more complete record to support his determination in a subsequent post-conviction attack." *Id.* at 466.

POINT III

The Holding Below Conflicts With Decisions in the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits.

Post-*Santobello* decisions in other circuits uphold a defendant's right to a hearing to establish a plea bargain when the sentencing court fails to make a record which clearly refutes its making. As required by *Santobello*, *Blackledge*, and *Boykin*, these Circuits thus recognize the due process right to a hearing, even in the face of contradictory statements in the allocution record, if a defendant makes a factual showing to support his claim—something petitioner actually did at a hearing held, the results of which the court below denies him:

First Circuit: *Correale* v. *United States*, 479 F.2d 944 (1st Cir. 1973) (defendant entitled to resentencing to conform, so far as then possible, to possibly misunderstood unfulfilled prosecution promise to defendant and his attorney). See also *Mawson* v. *United States*, 463 F.2d 29 (1st Cir. 1972).

Third Circuit: *Patrick* v. *Camden County Prosecutor*, 630 F.2d 206 (3rd Cir. 1980) (violation of plea bargain by state prosecutor entitled defendant to relief, but remedy referred to state court). Cf., *United States* v. *American Bag & Paper Corp.*, 609 F.2d 1066, 1068 (3rd Cir. 1979); *U. S. ex rel. Culbreath* v. *Rundle*, 466 F.2d 730 (3rd Cir. 1972) (ambiguous on-the-record reference at time of plea to precise terms of off-the-record agreement between counsel).

Fourth Circuit: *United States* v. *Hammerman*, 528 F.2d 326, 331-32 (4th Cir. 1975) (despite record denial that he was promised a no prison sentence, in view of imprecise on-the-record interrogation to exclude claimed unfulfilled promise, defendant entitled to a hearing). See also, *United States* v. *Carter*, 454 F.2d 426 (4th Cir. 1972), *cert. den.* 417 U.S. 933 (1974); *Edwards* v. *Garrison*, 539 F.2d 1374 (4th Cir. 1975); *Cooper* v. *United States*, *supra* (enforcement merely on basis of defendant's reasonable expectations).

Fifth Circuit: *United States* v. *McCord*, 618 F.2d 389, 392-93 (5th Cir. 1980) (hearing granted despite sentencing record which clearly contradicted claimed bargain); *Geisser* v. *U.S.*, 513 F.2d 862 (5th Cir. 1975), *on app. after remand*, 554 F.2d 698 (5th Cir. 1977) and, again, 627 F.2d 745 (5th Cir. 1980) (government must specifically perform plea bargain it repudiated because such a bargain "fits well within the realm of enforceable constitutional rights"). See also *United States* v. *Blair*, 470 F.2d 331 (5th Cir. 1972) (plea vacated as involuntary because trial judge did not inform defendant on-the-record of maximum sentence).

Seventh Circuit: *United States* v. *Cook*, 668 F.2d 317, 319-21 (7th Cir. 1982) (plea withdrawal permitted because of reliance on unfulfilled promise). See also, *United States* v. *Bowler*, 585 F.2d 851 (7th Cir. 1978).

Eighth Circuit: *United States* v. *Minnesota Mining, etc.*, 551 F.2d 1106, 1110-11 (8th Cir. 1977) (inviolability of government's promise which induced plea). See also *United States* v. *Runck*, 601 F.2d 968 (8th Cir. 1979); *United States* v. *Scharf*, 551 F.2d 1124 (8th Cir. 1977), *cert.*

den. 434 U.S. 824 (1977) (court's failure to develop terms of plea bargain on-the-record).

Ninth Circuit: *United States* v. *Arnett,* 628 F.2d 1162 (9th Cir. 1979) (defendant entitled to evidentiary hearing to establish alleged plea bargain), holding (at 1164), contrary to the ruling below herein:

> "What the parties agreed to in instant plea bargain is a question of fact. . . . Resolution of the good faith disputes over the terms of an agreement should be made by the district court, to whom the plea was originally submitted, on the bassi of adequate evidence,"

citing *United States* v. *Simmons,* 537 F.2d 1260 (4th Cir. 1976).

Eleventh Circuit: *Rowe* v. *Griffin,* 676 F.2d 524, 528 (11th Cir. 1982) (federal court injunction against state prosecution in violation of oral immunity agreement).

POINT IV

The Circuit Court Below Violated *Sumner* v. *Mata* and Ignored 28 U.S.C. §2254(d) Without Giving the Required Explanation.

In habeas proceedings, 28 U.S.C. §2254(d) requires a federal court to presume state court findings of fact to be correct unless it explains the reasons for departing from them. *Sumner* v. *Mata,* 449 U.S. 539, 546-50 (1981), after *rehearing,* —— U.S. ——, 71 L.Ed2d 840 (March 22, 1982).

Based upon its review of the full record of the state court proceedings, including the record of the Queens

County evidentiary hearing and the subsequent proceeding under N.Y. Criminal Procedure Law §§ 440.10 and 440.20, the District Court, in accord with 28 U.S.C. §2254(d)(8), found that "[a] review of the record presented to [Queens County Supreme Court] Judge Balbach establishes that the findings of the state court are supported by the record." (Appendix B, 30a-33a, at 32a.)

In view of the two-day hearing record, these findings were not clearly erroneous. They therefore must be affirmed by this Court. *LaVallee* v. *Della Rose,* 410 U.S. 690, 692, 695 (1972).

While this case is unusual (the Second Circuit called it "novel") in that it was the prosecutor who disputed and the Second Circuit which upset the finality of these undisturbed state court findings of fact, 28 U.S.C. §2254(d) nevertheless prohibits relitigation of such findings unless, as was not here the case, the merits were not resolved or the hearing was otherwise unfair. 28 U.S.C. §2254(d)(1)-(7).

The Second Circuit ruling below did not even consider the requirement that it state its reasons for disregarding the undisturbed state findings of fact in this case. See *Lonberger* v. *Jago,* 651 F.2d 447 (6th Cir. 1981) (defendant represented by "competent and capable counsel" but writ issued because court failed to make a satisfactory *Boykin* record); *Sumner* v. *Mata, supra.*

The Appellate Division (Appendix D, at 57a) found:

> ". . . based upon both our review of the record and the findings of Criminal Term, including its implicit findings with respect to credibility of witnesses, we con-

> clude that when the prosecutor indicated his assent that under the plea bargain petitioner would not be required by his office to 'give information', 'talk about' or 'be questioned about' matters covered in his Grand Jury testimony, he thereby gave his knowing consent that petitioner was not to be called before a Grand Jury by his office to discuss those matters."

In giving the background for this conclusion, that court observed (*id.*, at 54a):

> ". . . the plea bargain provided that, as a result of petitioner's having agreed to a felony, he would not be required to 'give information', 'talk about' or 'be questioned about' the matters covered in his perjury indictment. To petitioner's counsel this bargain barred any future Grand Jury testimony by petitioner concerning such matters. According to them, their client's primary concern throughout the plea negotiations had been to insure that he would be shielded from having to give any information, whether before a Grand Jury or otherwise, concerning his dealings with customers and others in the health care industry. This concern arose from petitioner's fear that if it ever became known that he had given such information he would be unable to continue to work as a commission meat salesman, his sole occupation for at least the preceding 18 years. Thus, petitioner's counsel portrayed the plea bargain, in essence, as one in which petitioner, who had no prior criminal record, and a good reputation, agreed to forego a possibly successful defense to the prosecution and to accept the ignominy of a felony conviction in return for being permitted to avoid giving information by which he would severely jeopardize his livelihood."

The Second Circuit, ignoring these findings and those of the District Court, instead said that the promise ". . . was

a nullity at the time the plea was accepted" and "therefore [petitioner's] reliance on the promise was unreasonable and is entitled to no recognition." Appendix A, at 15a. By footnote, the court added, in patent double-speak, that

> "Because Siegel's purported reliance on the constructive promise found by the Appellate Division was unreasonable as a matter of law, the promise cannot 'be said to be part of the inducement or consideration . . . [which] must be fulfilled. *Santobello,* 404 U.S. at 262.' " *Id.*

But as this Court has said in *Sumner* v. *Mata,* —— U.S. ——, 71 L.Ed2d 480, at 486 (1982):

> ". . . the federal court may give different weight to the facts as found by the state court and may reach a different conclusion in light of the legal standard. But the questions of fact that underlie this ultimate conclusion *are* governed by the statutory presumption as our earlier opinion made clear."

In the case at bar, the Second Circuit has paid less attention to the mandate of Section 2254(d) as applied by this Court than did the Ninth Circuit in *Sumner.*

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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